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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

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No. 1016

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JOHN RAYMOND JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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John Raymond Jones

2718 College Avenue
Berkeley, California
Pro Se

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Petitioner John Raymond Jones prays that a Writ of Certiorari issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 19, 1970, August 31, 1970, and September 28, 1970.

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## OPINION BELOW

The opinion of the Court below is reported in 3 S.S.L.R. 3170. It is reproduced as Appendix A herein. The orders are reproduced in Appendix B and Appendix C.

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## JURISDICTION

The order denying petitioner leave to file an additional brief was entered August 19, 1970. The opinion and judgment were entered August 31, 1970, affirming petitioner's conviction in the United States District Court for the Central District of California for violating 50 U.S.C. App. Section 462. By order entered on October 20, 1970, Mr. Justice Douglas extended petitioner's time in which to file a petition for Writ of Certiorari to and including November 27, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## QUESTION PRESENTED

Where a Selective Service registrant, after failure to report for induction, submitted written statements to his Local Board which would constitute a prima facie showing of conscientious objection under Welsh v. United States, and Welsh was decided subsequent to the argument on appeal.

Does the decision of the Court of Appeals to refuse registrant leave to raise the application of Welsh to his beliefs result in a denial of due process of law?

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## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment, Fifth Amendment, 50 U.S.C. App. Section 1, Section 456 (j), Selective Service regulations 32 C.F.R. Section 1625.2, 1625.14, 1626.24. They are set forth in Appendix D. .

## STATEMENT OF THE CASE

Petitioner was born on December 20, 1944. He attended high school in Glendale, California, and college at the University of California at Berkeley, where he graduated in 1967. He is married and currently a second year student at Boalt School of Law. He is petitioning in his own behalf due to a lack of funds. He wishes it were otherwise, but hopes the Court will consider his petition in light of this limitation.

Petitioner registered with the Selective Service System in 1962, was found acceptable in a physical examination in 1964, and was classified variously in I-A, I-S-C, and II-S. (Selective Service File, Exhibit 1, henceforth "SS", 2, 11, 18, 69). On July 26, 1967, while II-S, petitioner sent his Local Board a notice of change in address. (SS 63, Reporter's Transcript, henceforth "RT", 85-86). In September, 1967, petitioner and his wife moved to Canada, where petitioner had been accepted for graduate study at the University of Toronto. (RT 76, SS 76). Having inadequate funds to proceed with his education, petitioner took employment as a teacher in a school for retarded children. (SS 77).

Petitioner's opposition to participation in war in any form grew out of his reflection on the war in Vietnam. (SS 78). While petitioner had some religious insights, his objection to war could not be founded on his religious thinking alone; it required explanation in ethical terms. (SS 77, 78). He considered application for conscientious objector status, but felt his beliefs precluded application for such status. (SS 76) Since he could not participate in the military, he felt he had no path but exile or imprisonment. (SS 76, 80).

On December 5, 1967, petitioner was classified I-A, (SS 69), and on January 19, 1968, he was ordered to report for induction. (SS 70). On February 7, petitioner's induction day, he did not report. (SS 73-74).

By September 1968, petitioner had become deeply concerned by the increasing recourse to violence he witnessed in the United States. He

decided that in order to have "any reasonable possibility of changing what I felt to be the disastrous course of my mother country" he would return and "face the prospect of going to jail and an uncertain future in order to...do what (he might) to prevent the confrontation of the violent with the violent." (SS 77). Petitioner and his wife moved back to California. Petitioner than sent his draft board a letter. He declared he would not submit to induction. (SS 76). He understood the law to give no protection to one with his beliefs but looked forward to the day when:

> "the courts extend their recognition to the right of a man to refuse to comply with (induction)...if compliance...is for him morally, spiritually, and politically impossible." (SS 80).

Although the letter was contentious in parts (SS 76) it endeavoured to explain his course of conduct, (SS 76-77), and it revealed a searching effort to set down the beliefs which were the source of his opposition to "all wars and all private acts of violence." (SS 77-78). The components of that opposition to all wars were petitioner's notion of "what might be categorized as religious thinking," (SS 77), as well as his beliefs which had "their roots in ethical considerations." (SS 78).

Among other things petitioner said:

> "(M)an's facility for contemplation and the pursuit of his relationship to things in the natural world, has led him to see--both intuitively, through mystical experience, and empirically, through science--that all life is interrelated both in its creation and its survival. Man (has) been gifted with the ability to raise (himself) above the repetitions of ignorance and violence, self-interest and selfish love, and understand a higher order of design in the universe...(W)ithin an individual the harmony between thought and action is of primary importance if he is to be at peace enough with himself to be a guiding principle for others...If one who believes as I do consents to kill...he would put his actions at such disharmony with his beliefs that he would be rendered useless to himself and to others as a spiritual force....I feel what I have said pertains to all wars and to all private acts of violence....To admit the military position...is to deny that reason and generosity have any effect on the human spirit and to assume that people will ultimately resort to violence when there is disagreement among them. This is obviously not the case in ordinary human affairs, and only becomes so when fear and hatred, and/or the military get the upper hand." (SS77-78)

Petitioner received no response from his Local Board. Four months later, he was indicted under 50 U.C.S. § 462 for knowing failure to report for induction (February 26, 1969.) (CT 2-3).

At trial, counsel for petitioner moved to dismiss the indictment alleging s 6 (j) of the Act discriminated against non-religious objectors as opposed to religious objectors, (CT 44-45), and that deeply held moral conscientious objection was given no legal status. (CT 46-48; RT 72, 73). The trial judge denied the motion to dismiss. (RT 73-74).

Denied the presumption of receipt of mail, the Government contended petitioner's letter was proof of timely notice of induction because the first sentence read: (RT 59, 68)

> "I am sending this letter in the hope that it will clarify my position regarding my refusal to submit to induction." (SS 76)

and indicated petitioner could not submit to induction. Exception was taken, alleging this statement was irrelevant to allow a jury inference of knowing failure to report. This was denied. (RT 60-65, 76).

The jury returned a verdict of guilty and the trial judge denied a motion for judgment of acquittal. (RT 319). Petitioner was sentenced to three years imprisonment. (RT 323).

Oral argument on appeal took place on June 2, 1970, thirteen days before this Court decided Welsh v. United States, ___U.S.___, 38 U.S. L.W. 4486 (June 15, 1970). July 28, 1970, petitioner submitted, in propria persona, a motion for leave to file an additional brief, stating:

> "The grounds for this motion...are that the decision in Welsh indicated that the appellant's Local Board, like the rest of the Selective Service System, was operating under mistaken standards in the determination of conscientious objector claims. Thus, the issue of conscientious objection is now available to the appellant as it was not before June 15."

In a memorandum and exhibits that followed, petitioner stated that he had:

> "sought to obtain the assistance of the Department of Justice in vindicating his claim that he is a conscientious objector deterred by earlier restrictive interpretations of the Selective Service Act from pursuing his claim for conscientious objection.
>
> "If permitted to file an additional brief, appellant would demonstrate that the record reveals that...(he is) a conscientious objector within the meaning of that term as defined in Welsh; that he may be excused from having (not) pursued his claim within the Selective Service System under the doctrine of McKart v. United States...and that... his conviction should be reversed. Appellant grants that the Court might decide, after such briefing and any oral argument thought necessary, to remand the case for a factual inquiry in the district court..."

Petitioner's attached letter to the Justice Department requested that he be allowed to apply for a 1-O classification through the Selective Service System and perform alternative service.

The Court of Appeals took judicial notice of Welsh, but denied the motion to submit the brief on August 19th; affirmed the conviction August 31st; and denied petition for rehearing, which also raised petitioner's conscientious objector claim, September 28th.

Petitioner has re-submitted the pertinent parts of his letter of October 28, 1968, to his local board on a Selective Service System form 150,* and called attention to his new understanding that he is eligible for I-O on the basis of Welsh. The Local Board has taken no action.

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* This form was requested August 9th, finally sent to petitioner September 28th, after several exchanges of letters, and returned to the Board October 16, 1970.

## REASONS FOR GRANTING THE WRIT

By denying petitioner leave to file an additional brief raising the application of Welsh v. United States, ___ U.S. ___ 38 U.S.L.W. 4486, (1970) to his own conscientious objector beliefs, the Court of Appeals has raised a serious question of due process which should be dealt with by this Court.

Welsh acknowledged a deeply important fact--the existence of a widespread good faith misconception among registrants about the "religious training and belief" requirement of the § 6 (j) exemption. It is crucial for this Court to resolve the issue of whether such a misconception must now bind a registrant to a waiver of his right to claim that exemption.

The alternative--no resolution--is clear. A conscientious objector who did not apprehend his right will be denied the opportunity to show in Court that he should be excused from his failure to raise his claim, and will also be denied the opportunity to raise the claim with his Local Board.

The Seventh Circuit in United States v. Shields, (1969, No. 72 Appellate Docket; petition for certiorari filed by the Solicitor General 1-5-70), remedied a very similar situation. The Ninth Circuit's aforementioned decision stands in fundamental conflict with Shields.

If left standing, the Ninth Circuit's decision:

Denies the opportunity to assert a right never before available, or reasonably perceived as such, in conflict with Brinkerhoff--Farts Co. v. Hill, 281 U.S. 673 (1929).

Leaves standing a criminal sanction on a registrant whose crime is that he failed to pursue an exemption which he may be reasonably excused from pursuing, in conflict with McKart v. United States 395 U.S. 185, 89 S.Ct. 1657 (1969).

Imposes a waiver where there was no intentional abandonment of a

a known right or privilege, in conflict with Johnson v. Zerbst, 304 U.S. 458 (1938).

Results in a double standard of due process on the right to a re-opening under §1625.2, in conflict with Mulloy v. United States, ___U.S.___, 3 S.S.L.R. 3301 (1970).

Defeats the intent of Congress as expressed in § 6 (j).

And obstructs the fair implementation of Welsh, supra.

Certiorari has been granted in Ehlert v. United States (No. 120, October Term, 1970), wherein restrictive interpretations of §1625.2 are under attack, as they are here.

## ARGUMENT

I. The Denial of the Opportunity to be Heard will Result in a Deprivation of Liberty without Due Process of Law: the Courts.

A. The Conflict with Welsh

> Welsh acknowledged the existence of a widely held misconception about the requirements for exemption under § 6 (j), and this Court should now act to relieve the burden imposed upon registrant due to that misconception.

In Welsh v. United States, this Court clarified the scope of the word "religious" in § 6 (j) extending the right to status as conscientious objectors to all those registrants "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." On the way to that clarification, Mr. Justice Black said:

> "(V)ery few registrants are fully aware of the broad scope of the word "religious" as used in § 6 (j)..."

Thereby this Court acknowledged that many registrants have misunderstood the statutory prerequisite to making application as a conscientious objector: being able to attest that one is conscientiously opposed to participation in war "by reason of religious training and belief."

In its brief in Oestereich v. Local Board No. 11, infra, the Government said at p. 65:

> "The question of the validity of a claim to conscientious objector status may be one of great difficulty and cannot be readily determined on an objective basis, as can other grounds for exemption."

This statement was addressed to the evaluative process of the Local Board, but it applies equally to the evaluation the registrant must perform on his own beliefs before he may conscientiously apply for the exemption. The question facing the Board is the "validity" of the beliefs--one which "require(s)...the exercise of discretion," McKart v. United States, n. 16, supra. The question facing the registrant is the source of his beliefs, and whether he can claim the exemption for the reasons required by law. This demands that a registrant, especially one who has no traditional religion, search within himself. At the point of decision, the statutory test is crucial. He must consider himself in light of it before he signs his name. If he reads it as precluding his oath, whether by an accurate reading or a misconstruction, it follows that he will not apply.

At issue is not the familiar failure to acquaint oneself with procedural rights, clearly ascertainable. Here is a matter of substantive law, in one of the most difficult and subjective areas of interpretation observable. § 6 (j) must bear the tension between free exercise of religion, State neutrality, and the power to raise an army, Welsh, supra, Mr. Justice White dissenting; between the command to mobilize a fighting force and the conscience of the individual who cannot come to kill. It is at the crossroads. So is the individual who finds it on his path.

The consequence facing a registrant who could not in good faith hold himself out as a conscientious objector "by reason of religious training and belief", who construed too narrowly the broad scope of that phrase, but who, nonetheless, could not relinquish his conscientious scruples against participation in war, is imprisonment.

Petitioner requested leave to file an additional brief discussing the application of Welsh to written statements he had made to his Local Board fifteen months before the decision in Welsh, when Welsh was decided

thirteen days after oral argument on his appeal. Petitioner offered to demonstrate that

> "he is a conscientious objector deterred by earlier restrictive interpretations of the Selectiv Service Act from pursuing his claim of conscientious objection..., (that he was) a conscientious objector within the meaning of that term as defined in Welsh...(and) may be excused from having (not) pursued his claim within the Selective Service System..."

By refusing him leave to file a brief, the Court of Appeals denied him any opportunity to present his claim, and to excuse his failure to raise it with his Board. Other decisions United States v. Palmer 401 F2d 226; United States v. Lloyd, ___F2d___(No. 25,337, August 28, 1970) p. 13,14, foreclose his right to any Board action on the formal claim he has now filed. If this decision stands, his contentions will go unheard.

B. The Conflict with Brinkerhoff

> Due Process requires that where a right has now become available to a registrant, deprivation of his liberty cannot be had without an opportunity for some hearing on that right.

In his concurring opinion in Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 243 n. 6 (1968), Mr. Justice Harlan stated: "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims..."

Petitioner's situation strikingly parallels that described in Brinkerhoff-Faris Co. v. Hill, supra, where the petitioner claimed the deprivation of his property without due process of law. He had been denied relief due to a failure to exhause an administrative remedy which, under decisions just overruled, was never open to him and which, now, it was too late for him to invoke. Mr. Justice Brandeis spoke for a unanimous Court:

> "The judgment...must be reversed, because it has denied to the plaintiff due process of law--using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> "It would have been entirely futile for the plaintiff to apply to the

Commission. That body had persistently refused to entertain such applications and the ... Court had supported it in its refusal.

"The (lower) court refused to hear the plaintiff's complaint... not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and is not now open to it.

"We are not now concerned with the rights of the plaintiff on the merits...our present concern is solely with the question of whether the plaintiff has been accorded due process in the primary sense--whether it had an opportunity to present its case and be heard in its support.

"Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The mere existence of habeas corpus as a remedy after the substantial deprivation of liberty should not so serve to abrogate the duty to prevent the damage if possible. This would "turn an ultimate safeguard of law into an excuse for its violation." H. M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts, An Exercise in Dialectic," 66 Harv. L.R. 1326, (1953.)

In all likelihood this is a case where letting the aforementioned decision stand will "require the courts to march up the hill when it is apparent from the beginning that they will have to march down again." Estep v. United States 327 U.S. 114 at 125, 66 S.Ct. 423 at 429.

"Due process of law is not dispensed on the basis of what might have or should have been done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious." Mr. Justice Murphy, concurring in Estep, supra at 131, 431.

C. The Conflict with McKart

> Where a right only becomes available to a registrant through statutory interpretation and the pursuit of that right through administrative channels would have been futile--a failure to pursue the right is excusable where severe criminal sanction would otherwise be imposed.

Petitioner's situation is also strikingly similar to the petitioner's in McKart, supra. McKart failed to report for a pre-induction physical

(petitioner requested one and passed it); McKart was then ordered to report, he failed to do so; instead he sent a letter to his Local Board saying he did not believe in killing, that the Selective Service System violated his beliefs, and that he refused to have anything to do with it; the Board sent him a form 150; McKart returned the form uncompleted, stating he wanted nothing to do with the Selective Service System; the Board then requested information on his status as a sole surviving son and, on its own initiative, classified him IV-A; upon his mother's death, the Board reclassified him I-A; he did not appeal; he failed to comply with a subsequent Induction Order. The District Court found McKart had intentionally refused to exhaust his remedies or to have anything to do with the System. Government brief, p. 2, 3, 4.

Before this Court, the Government argued that McKart was barred from challenging his classification, which involved an attack on the statutory interpretation of the term "sole surviving son," because he failed to exhaust his administrative remedies.

Concurring in McKart's interpretation of the statute, the Court, Mr. Justice Marshall, said that in a criminal prosecution against a Selective Service registrant, strict adherence to the exhaustion doctrine "should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant." 395 U.S. 185 at 197, 89 S.Ct. 1657 at 1664. The Court focused on the proposition that where a question is "solely one of statutory interpretation... (and) the proper interpretation is certainly not a matter of discretion," the failure to exhause may be excused. To do otherwise would have been to convict the registrant for his failure to pursue a procedure which would have, in all probability, been futile, since the system's initial error of statutory interpretation was not the sort of error which the exhaustion process was intended to correct. And the logic extends past this. The registrant could neither have been expected to perceive the error in statutory interpretation which foreclosed his right to exemption nor to have challenged that interpretation before the Board.

The application to the present case is compelling: prior to Welsh, supra, the Boards were operating under a statutory interpretation of "religious training and belief" which has now been held to be over-narrow and acknowledged to be misleading. The opportunities for petitioner's success in a challenge to this statutory test before his Board, or within the System, were no greater than McKart's opportunities were.

Given the prior statutory test, no discretionary finding by the Board could have overcome the fact that petitioner could not say that he was a conscientious objector "by reason of religious training and belief."

Where an exemption's requirements dictate that the registrant make an evaluative determination of his own beliefs in light of a statutory test before he presents his claim to the Board--and that test is over narrow or unclear--it is unconscionable to deny the registrant an opportunity to excuse himself for the failure to apprehend, or to exhaust, a remedy that is one in name only.

Nor is this all. Because of the broadly discretionary nature of the initial Board hearing on a conscientious objector claim, it is at least as reasonable to excuse a failure to apply where the registrant has in good faith not perceived his right as to excuse a failure to appeal from a denial. For a registrant who might apply but who could not conscientiously put forth the "reason of religious training and belief", standing by itself, as the source of his conscientious objection, if he were candid with his Board, would risk the Board's discretionary finding that his beliefs were not genuine, or that he was insincere. And such findings are not, for practical purposes, reviewable by the Appeal Board, which gets only a copy of the Board's record at the hearing, and can neither allow a personal appearance nor consider further evidence from the registrant. § 1626.24. Judicial review of such discretionary findings on conscientious objector claims is particularly narrow, even if the claim is "properly" raised. Mulloy v. United States, 3 S.S.L.R. 3306 (1970) n. 6, Witmer

v. United States, 75 S.Ct. 392 at 395, 396, 397, 348 U.S. 375 at 380, 381, 382, 383.

In United States v. Eades, (August 5, 1970) 3 S.S.L.R., 3185, the Court of Appeals for the Fourth Circuit reversed the conviction of a conscientious objector claimant in light of Welsh, where the claimant had made a prima facie case, and applied the holding in McKart to excuse registrant's failure to exhaust his administrative remedies.

> "It is true that Eades did not appeal from his classification as I-A by the Local Board. However, this case cannot be distinguished from McKart v. United States. In each case all administrative remedies were closed at the time of trial, the defense based on construction was essential to the defendant's case, and there was no disputed issue other than that of statutory construction....Footnote 16 of McKart notes that conscientious objector claims typically require Board expertise and discretion, making such cases singularly appropriate for the application of the doctrine of exhaustion of administrative remedies. The McKart footnote, however was addressed to the resolution of factual issues as sincerity of conviction, not to issues of statutory construction."

Where it was appropriate to excuse registrant McKart from failing to challenge his classification before the Local Board, it is equally appropriate to, at least, allow petitioner the opportunity to present arguments and evidence to excuse his failure. Petitioner was restricted by decisions in the Circuit from raising his right to a I-O, as he did not apply prior to his induction date, United States v. Wroblewsky, (C.A. 9, 1970) 3 S.S.L.R. 3261, citing United States v. Lockhart, infra. He attacked the statute in a motion to dismiss, alleging it invalid for discriminating against men whose conscientious objection is based on deeply held moral beliefs (CT 48); he was precluded from doing more. Petitioner's crime was a reasonable misunderstanding that he could not qualify as a conscientious objector, based on the misleading interpretation of the law by the Selective Service System, and a perception of futility, both in the legal and more common sense. While his indictment, like McKart's, alleged knowing failure to report, his crime, like McKart's, lay in failing to pursue an exemption which he may be reasonably excused from pursuing and which, had he pursued under the law as it stands, he would probably have received.

As in Brinkerhoff, supra, this Court is not asked to pass on the

merits of petitioner's contention, nor excuse him from exhaustion, but merely allow him the "opportunity to present to any competent forum--agency or court--" , Oestereich, supra, p. 243, his claim, and the reasons for his failure to exhaust it.

D. The Conflict with Johnson v. Zerbst

Where a right has not been knowingly relinquished, there can be no waiver of that right.

To hold otherwise would bind petitioner to a waiver of his right, where it may be established by the record that he did not know that he had a right or privilege under the statute.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 US. 458, 464 (1938.)

> "Knowledge of a right is therefore essential to its waiver. So also is knowledge of the consequences of foregoing a privilege, for "it is only through awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege," Miranda v. Arizona 384 U.S. 436, 469 (1966). Moreover, waiver of a right can be rationally inferred from an act or omission only when there is an awareness that this will be the consequence (Miranda v. Arizona, supra, at 475; Moser v. United States, 341 U.S. 41, 46-47 (1951), see also Johnson v. United States, 318 U.S. 189, 196-99 (1943) ), for only then can the relinquishment of the right be said to be intentional, as it must before waiver can be found....Even if (the registrant)had intentionally relinquished his right to administrative appeal, his relinquishment of that right could not constitute an intelligent waiver of the right to proffer a defense in the subsequent criminal prosecution for he was not aware of this consequence of bypassing the administrative appeal."

United States v. Lockhart, 1 S.S.L.R. 3204 at 3207, 3208 (C.A. 9, 1968) Browning, J., concurring. (Lockhart applied for a I-O, was refused, and did not appeal.)

E. The Conflict with Shields

The Court of Appeals for the Seventh Circuit has remedied a situation parallel to petitioner's, by allowing the registrant to now pursue his administrative remedies, where his prior failure to do so was based on forgiveable mistake.

Appellant Shields could not make conscientious application for the § 6 (j) exemption because two elements necessary to the status were absent from his beliefs (the pre Welsh religious requirement and the

war in any form requirement). Shields was ignorant of the exhaustion requirement. United States v. Sisson 297 F Supp. 902, ___U.S.___, was pending before this Court, and a determination on the merits for Sisson would have removed the obstacles to a § 6 (j) exemption for Shields. The Court of Appeals reversed Shields conviction and remanded his case so that he could exhaust his administrative remedies with the Board. Thus the Court never reached the issue of the applicability of McKart. It simply found that the circumstances of the case were such that the defendant ought to be relieved of the consequences of his failure to present his claim to his local board. And it allowed the Board the opportunity to evaluate Shields' claim and his sincerity.

The Shields remedy would be reasonable, efficient and fair in this case. It comports with Mr. Justice Harlan's concern in Oestereich. It allows the Local Board to perform its discretionary function.

Petitioner submits that it should be a model where the statutory test has been too misleading, and the registrant's misunderstanding too reasonable to impose an automatic bar to any relief.

Conclusion to I

Petitioner submits that this case should be remanded to the Court of Appeals for briefing and argument, and to the District Court if further factual findings are required. Or, that the judgment be vacated to give Petitioner an opportunity to exhaust his remedies with his Local Board, as was done in Shields.

II. The Denial of the Opportunity to be Heard will Result in a Deprivation of Liberty without Due Process of Law: The Local Board.

A. §1625.2 as construed by the Ninth Circuit is in Conflict with the Express Intent of Congress.

Other decisions of the Ninth Circuit foreclose the petitioner from requiring the Board to take any action on his claim. Palmer, supra,

Lloyd, supra. The result leaves petitioner without any rights under § 1625.2, thus defeating the intent of the Statute 6 (j).

It is the policy of Congress that the operation of the system be "fair and just." § 1, Military Selective Service Act. In Simmons v. United States, 75 S. Ct. 397, (1955) this Court held that the processing of conscientious objector claims should represent

> "a balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant."

§ 1625.2 was originally issued in December of 1941, a time of deep crisis, and was amended to its present form in 1942, holding that a reopening could not be granted after the issuance of an Induction Order, except on a showing of a change in status resulting from circumstances beyond the registrant's control.

It is the intent of Congress set forth in § 6 (j) that

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Implicit in this statute is the right to a hearing, and thus the opportunity to have a claim "sustained by the local board." Yet where the registrant has failed to comply with an Induction Order, the Ninth Circuit construes § 1625.2 as a bar to requiring that the Board take any action on a conscientious objector claim submitted by the registrant. Palmer, supra, Lloyd, supra.

Enforced with this construction, the regulation withdraws the right created by the statute. As was stated in United States v. Underwood 151 F. Supp. 874 (E.D. Pa. 1955)

> "Nowhere in the Act does it provide that unless the registrant makes his claim before the notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such an intention in unmistakable terms... While regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith."

As pointed out by this Court, the purpose of regulations is to carry into effect the will of Congress as expressed by the statute. "A regu-

lation which does not do this but operates to create a rule out of harmony with the statute, is a mere nullity." Mr. Justice Brennan, in Dixon v. United States, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed. 223 (1965).

It is submitted that where applied to bar hearing on the claims of conscientious objectors, whenever made, § 1625.2 is both contrary to the policy of fairness and to the express intent of the statute that conscientious objectors be exempt from military service and be compelled instead to perform civilian work in the national interest, and is therefore null and void.

B. The Judge-made Restriction on § 1625.2 creates a Double Standard of Due Process and is in Fundamental Conflict with Mulloy.

In the Ninth Circuit, even a post-induction-date conscientious objector claimant who presents a prima facie showing of a change in his status resulting from circumstances beyond his control is barred from requiring his Board to take any action under §§ 1625.2, Palmer, supra, Lloyd, supra.

The dilemma of a conscientious objector claimant who cannot convince a Board to reopen his classification was brought to light in Mulloy, supra: "A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy (to challenge the legality of his classification) because his religious belief prevents him from accepting induction under any circumstances." It is clear that failure to comply may be an integral part of a registrant's conscientious objection, and necessary to preserve his right to assert the claim. If a registrant is in a position to assert that claim for the first time, due to a change of circumstances beyond his control, barring his right to do so because he has failed to comply with induction is violative of due process.

In Oestereich v. United States, 393 U.S. 233 at 7, 237 (1968), this Court said:

> "There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or

conduct not material to the grant or withdrawal of the exemption." A fortiori, where a registrant would now meet an exemption's terms and conditions; a Board cannot withhold it from him, and certainly cannot withhold consideration of it, for conduct in keeping with the requirement for the exemption.

The regulations clearly authorize the Board to reopen, even where a registrant has failed to comply with an Order to Report for Induction, and to cancel the outstanding Order,

> "except that if the registrant has failed to comply with (the Order), the reopening of his classification thereafter by the Local Board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply." * §1625.14.

Assuming, arguendo, that, for a conscientious objector claimant, a showing of circumstances beyond his control resulting in a change in his status is a reasonable prerequisite to a post-induction-date reopening, the Board must accord the registrant the same due process in making its determination as though his were a pre-induction-date request. The Board's differing treatment of post-induction-date claimants cannot result from a double standard of due process, but only from the different nature of the determination it is authorized to make. That is, to "specifically find there has been a change in the registrant's status resulting from circumstances over which (he) had no control." §1625.2.

There is nothing in the regulations or the Act to suggest that the authority to make such a specific finding is any more or less discretionary than the authority to make the reopening decision itself. Thus, it follows that where a prima facie case of "a change..." is presented to the Board, the Board is held to the same level of due process in its determination, as it would be if the determination involved the actual decision to reopen.**

---

* The Ninth Circuit has recognized as much in Lloyd, supra, and Palmer, supra, but have barred, the registrant from requiring the Board to act, even upon the proper showing.

** It could be argued that this specific finding is, in effect, the decision to reopen and, a fortiori, requires the same due process standard in its determination. The decision as to whether there has been a "change in

Mulloy, supra, found the right to a reopening to be an "essential procedural right." Mr. Justice Stewart for a unanimous Court said:

> "(W)hether or not a reopening is granted is a matter of substance, for with a reopening comes the right to be heard personally and to appeal....Though the language of 32 C.F.R. § 1625.2 is permissive, it does not follow that a Board may arbitrarily refuse to reopen a registrant's classification....Where a registrant makes nonfrivolous allegations of facts that have not previously considered by his Board, and that, if true, would be sufficient under the regulation or statute to warrant granting the requested reclassification....Where a prima facie case for reclassification has been made, a Board cannot deprive the registrant of such review by simply refusing to reopen his file."

Likewise, where a prima facie case of a change in circumstances beyond the registrant's control has been made, the Board cannot deprive the registrant of a hearing by simply refusing to notice his claim.

It is petitioner's contention that this Court's holding in Welsh not only excuses a good faith misconception of the threshold requirements for the § 6(J) exemption, but operates on his written statements of beliefs submitted fifteen months prior to Welsh, to qualify those beliefs as prima facie evidence of conscientious objection. Thus, a change in the registrant's status has resulted from circumstances beyond his control, and he is entitled to an opportunity to have a hearing on that issue.

In Gutknecht v. United States, 90 S.Ct. 506 (1970), this Court, citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 1204, Mr. Justice Douglas, said :

---

*cont.
the registrant's status" refers to his draft status, and involves deciding whether the "information present(ed)...if true would justify a change in the registrant's classification," which is the question posed in a pre-induction-order request for a reopening. Under this reading, the only difference between a pre-induction-order determination and a post-induction order determination is the additional requirement of finding a change in circumstances beyond the registrant's control in the latter situation. Under either reading of the language, it is clear that a Board's post-induction-order "specific finding" should be held to the same level of due process as the pre-induction order decision to reopen.

"Where the liberties of the citizens are involved, we said that 'we will construe narrowly all delegated powers that curtail or dilute them."

Mr. Justice Stewart, concurring, stated of the Selective Service System:

"(T)heir purpose is to provide young men for the armed services, not the penitentiaries." at 516.

Conclusion to II

To let the decision stand is to take a registrant with an excusable misconception that he was not entitled to a substantive right, and bind him to his error. It is an invidious discrimination to stigmatize him as a felon and imprison him, while another man who had submitted the same beliefs prior to his failure to comply would now be classified I-O and given constructive work to perform in the service of his country.

The bar should be removed from § 1625.2 so as to allow petitioner the right to require a specific finding on whether there has been a change in his status resulting from circumstances beyond his control.

Petitioner does not stand alone. Young men facing criminal prosecution and imprisonment, or now in prison, turn to this Court. Both justice and their liberty make these compelling issues for the Court to resolve.

Conclusion to the Petition

For the aforementioned reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Dated, November 25, 1970

Respectfully submitted,

John Raymond Jones
2718 College Avenue
Berkeley, Calif. 94705

Pro Se.

ADDENDA

SECONDARY QUESTION:"

Where the Government was denied presumption of receipt of mail, did the Court of Appeals err in allowing a statement of intention to refuse induction as proof of knowing failure to report?

Petitioner's indictment charged him with knowing failure to report. Since both petitioner's I-A classification and Order to Report for Induction were mailed to an address other than the one which petitioner last gave his Board, the Government relied on the following as a statement relevant to allow a jury inference of knowing failure to report:

> "I am sending this letter in the hope that it will clarify my position regarding my refusal to submit to induction." (SS 76)

Counsel for petitioner objected that this statement was irrelevant to allow inference of knowing failure to report. Objection was denied. (RT 59-76).

In its decision, the Court of Appeals quoted parts of the letter which were excised from the exhibit which went to the jury, to support its finding that such statements were "enough information to create a question", i.e., to allow a jury inference of knowing failure to report.

While it may be that the Government offered enough evidence to convince the Court of Appeals of its contentions, this was more evidence than the jury saw. The jury got Exhibit I-A. The Court of Appeals quoted from Exhibit I which, while in the record, never reached the jury. (RT 76) (Appendix page 4).

(I raise this issue only to preserve it, as I have not had the opportunity to research it adequately.)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | ) | |
| vs. | ) | No. 25,210 |
| JOHN RAYMOND JONES, Defendant-Appellant. | ) | |

On Appeal from the United States District Court for the Central District of California

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges

MERRILL, Circuit Judge:

Appellant was convicted following jury trial of failure to report for induction into the armed forces.

On this appeal his first contention is that he was called for induction out of order.

This challenge is directed to the call issued by the California State Director on the local boards of the state. The call to appellant's board was for 13 men, but also, pursuant to state practice, stated: "* * * delinquents will be ordered for induction in addition to the number of men specified * * *." The board called 13 men (of whom appellant was No. 4), plus 2 delinquents - a total of 15 men. Appellant asserts that this was contrary to regulations fixing order of call. He argues that the numerical specification must, under the regulations, include the delinquents rather than be added to them. He calculates that during the time in which the present practice has been followed a total of around 40 men over and above the number specified in the calls of the State Director were ordered for induction by his board; that had this number been included within the number specified in this and previous calls he would never have been called at the time he was.[1]

This contention was recently considered and rejected by this court in United States v. Lloyd, ____ F.2d ____ (9th Cir. Aug. 28, 1970). To the reasons there expressed we add the following:

As we view appellant's complaint it is directed not against the order of call - he does not claim he was called before someone who should have been called first - but against the quota assigned by the State Director to the local board and the manner in which it was fixed - a specified number of inductees added to an unspecified number of delinquents.

The regulations provided that the State Director, on receipt of a Notice of Call on State from the Director shall "allocate to the local boards concerned within his State * * * the number of men which his State is called upon to furnish * * *." 32 C.F.R. 1631.6.

The problems of the State Director must be borne in mind and the regulations read with sufficient flexibility to provide him room to meet his responsibilities. His duty to the state is to deliver a specified number of men. The question remains how many men must be ordered for induction in order to meet this quota. The responsibility for determining this question, in California at least, is assumed by the State Director and his determination is based on state-wide experience as to the extent of state-wide overcall of registrants necessary to produce the state quota.

In California's experience the response to orders for induction on the part of delinquents is minimal. Under these circumstances to insist upon including them in the numerical specification would seem only to complicate the call on local boards. To include them without increasing the number specified would be to place on their response a reliance which experience does not warrant. The alternative would require the State Director to adjust the local

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CARD 2

board's quota by increasing the number specified to include the appropriate number of delinquents. In this case it would only have meant that the local board's quota would have been 15, instead of 13 plus delinquents. Appellant's proposals thus would seem to accomplish nothing of value. In light of his experience the solution of the State Director seems eminently reasonable and most certainly is not arbitrary.

We conclude that the State Director's call on the local board was not contrary to regulations and that appellant was, in proper order, summoned for induction. The issue presented was not one of fact and it was not error to refuse to give it to the jury.

Appellant contends that the Government has failed to maintain its burden of establishing that he received his order to report for induction. Appellant has presented no evidence to the effect that he did not receive it. At the time of registration in 1962 appellant's home address was given as Glendale, California. After 1965 he received student deferments and in 1967 the board was notified of a change of address to Berkeley. Later the board was notified that he had been graduated from college. In February, 1968, he was ordered to report for induction. The order was sent not to the Berkeley address but to the Glendale address. It was never returned to the board as undelivered.

In November, 1968, the board received a letter from appellant under date of October 30, 1968. He did not assert lack of notice. Instead he stated in part:

> "I am sending this letter in the hope that it will clarify my position regarding my refusal to submit to induction.
>
> This clarification involves two points; my objections to militarism and the selective service system, and my reasons for taking the course I have taken in refusing to cooperate.
>
> * * * I had decided that I would refuse to cooperate with the selective service system either by applying for further deferments, by reporting my marriage or other changes of status, or by answering any induction notices.
>
> * * *I do not believe the authority of the selective service

system to be legitimate, and I did not have, nor do I have any intention of consenting to its authority by placing myself under its jurisdiction.

As a consequence of my beliefs I had two choices open to me. I could formally refuse induction, thereby placing myself under the jurisdiction of the legal system rather than the illegitimate selective service system; or I could exile myself in a country whose policies were consistent enough with my beliefs that I would not face a prison sentence * * *."

After explaining his subsequent conclusion that it had been a mistake to exile himself to Canada, he continued as follows:

"My wife in agreement, we decided to return to the United States, to face the legal consequences of my refusal to submit to induction * * *."

While the Government did not have the benefit of the regulations' presumption that mail was received,[2] this does not mean that receipt cannot otherwise be established. In our view the Government has provided enough to create a jury question. The same applies to appellant's contentions respecting notice of his classification and of his right to personal appearance and appeal.

Appellant assigns as error the admission in evidence of the letter. In our judgment it was relevant.

We find no merit in appellant's contentions respecting jury instructions.

Judgment affirmed.

## FOOTNOTES

1. (Page 1) Gutknecht v. United States, 396 U.S. 295 (1970), has of course eliminated delinquents as a category of call and it is argued that appellant cannot claim to have been prejudiced by any disregard of the order of call respecting them. We prefer, however, to deal with the order of call regulation as it existed at the time appellant was ordered to report.

2. (Page 4) 32 C.F.R. 1641.3 provides:

"It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | ) | |
| vs. | ) | No. 25,210 |
| JOHN RAYMOND JONES, Defendant-Appellant. | ) | |

Order Denying Motion for Leave to File Additional Brief

(August 19, 1970)

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges

The Court judicially notices the decision in Welsh v. United States (1970) 38 U.S.L.W. 4485. Appellant's motion for leave to file additional brief is denied.

## APPENDIX C

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | |
| vs. | No. 25,210 |
| JOHN RAYMOND JONES, Defendant-Appellant. | |

### Order Denying Petition for Rehearing

### (September 28, 1970)

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed September 14, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

# APPENDIX D

## Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## Amendment V

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789: ratified December 15, 1791.

Congress declared in Section 6 (j) of the Military Selective Service Act of 1967 that:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the Armed Forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local

board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

"(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E.O. 10292, 16 F.R. 9862, Sept. 28, 1951)) provides:

"When registrant's classification may be reopened and considered anew. -- The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1625.14 provides:

"Cancellation of Order to Report for Induction or for Civilian Work by reopening of classification. -- The reopening of the classification of a registrant by the local board shall cancel any Order To Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply."

Section 1626.24 provides:

"Review by Appeal Board. --(a) The appeal board shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event they shall be considered in such order as the Director of Selective Service shall prescribe. (b) In reviewing the appeal

and classifying the registrant, the appeal board shall not receive or consider any information other than the following: (1) Information contained in the record received from the local board. (2) General information concerning economic, industrial, and social conditions.

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1970, three copies of the Petition for Writ of Certiorari were mailed postage prepaid to

Erwin N. Griswold
Solicitor General Of The United States
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

John Raymond Jones

2718 College Avenue
Berkeley, California

Pro Se

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Supreme Court, U.S.
FILED
NOV 27 1970
E. ROBERT SEAVER, CLERK

No. 1016

JOHN RAYMOND JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

## MOTION TO DISPENSE WITH PRINTING THE PETITION FOR WRIT OF CERTIORARI

Now comes John Raymond Jones, petitioner in the above entitled case, and moves for leave to file the petition for certiorari in unprinted form. In support of this motion, petitioner states:

He is presently a second year student at Boalt School of Law. He pursued his appeal in the Ninth Circuit in forma pauperis. His financial position has not substantially changed since he filed his in forma pauperis declaration. His wife is now employed, whereas she was not before, but he is heavily in debt as a result of legal and educational expenses. He is submitting his petition for writ of certiorari Pro Se as he cannot afford counsel. If certiorari is granted, he would at that time request leave to proceed in forma pauperis before this Court. His only reason for not proceeding in forma pauperis at this point is that he wishes his case to be placed on the appellate docket. However, he can spare no funds for the printing of his petition.

Wherefore petitioner prays that an order be entered dispensing with the printing of the petition for writ of certiorari in this case.

November 25, 1970

John Raymond Jones

2718 College Avenue
Berkeley, California
Pro Se

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1970, a copy of the foregoing motion was mailed postage prepaid to

Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

John Raymond Jones

2718 College Avenue
Berkeley, California

Pro Se

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1016

JOHN RAYMOND JONES, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of the failure to obey an order to report for induction, in violation of 50 U.S.C. App. 462(a)(2). On August 25, 1969, he was sentenced to three years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (3 R. 323).[1]

The record shows that petitioner, who was born in 1944, was granted student deferments between 1962

[1] "R." preceded by the volume number refers to the three numbered volumes of the court of appeals' record presently on file with the Clerk of this Court. The transcript of trial is contained in volumes 2 and 3.



412-687—70

and 1967 (SS File 4–7, 11, 38, 41, 48, 52).[1] In October 1967 the local board was advised by the University of California that petitioner had graduated in September 1967 (SS File 67). In December 1967, the board classified petitioner 1–A (SS File 11). Although advised of this classification and of his right to appeal (SS File 68, 69), he did not appeal. In January 1968, he was ordered to report for induction on February 7, 1968 (SS File 11, 70), but did not report (SS File 73–74, Pet. 3). In October 1968, approximately eight months after failing to report for induction, petitioner wrote his draft board the letter set forth in the opinion below (Pet. App. A3) explaining why he had refused to submit to induction and asserting his belief that the selective service system was illegitimate.

In a pretrial motion and in argument, petitioner's counsel asserted in part that the filing of claims and the taking of appeals through the Selective Service System "is basically a violation of the traditional separation of the Church and State and resulted in an impairment of the right to exercise freedom of religion" (2 R. 72–73). Petitioner did not, however, endeavor to present any evidence that he was a conscientious objector. Nor did he raise that issue originally on appeal. His defenses, and arguments on appeal, were that he was called out of turn and that

[1] "SS File" refers to Government Exhibit 1 A which consists of those portions of petitioner's selective service file which the court ruled were admissible (2 R. 65–71, Pet. 22). The complete file is designated Government Exhibit 1.

there was insufficient evidence to show receipt of the notice to report for induction.[2]

After the decision in *Welsh* v. *United States*, 398 U.S. 333, petitioner asked leave to file an additional brief in the court of appeals, asserting that his conviction should be set aside because he had been deterred from filing a claim for classification as a conscientious objector by the belief that a non-religious conscientious objector could not obtain exemption from military service. The denial of this motion is the main issue raised by petitioner in this petition.

The court below was correct in denying the motion because petitioner's conscientious objector claim at that late stage could not affect the validity of his conviction. Petitioner made no claim to his draft board prior to his failure to report. He cannot therefore complain of the failure of the local board to give him a classification which he did not request. *United States*

[2] Petitioner's parents lived in Glendale, California; he gave the local board their address as the permanent address at which he could be reached (SS File 2–5). In July 1967, when a dean of students at the Berkeley campus of the University of California advised the board of petitioner's status as a student, the report, co-signed by petitioner, indicated that petitioner was then living at an address in Berkeley which was both his campus and permanent address (SS File 63). Since the college, rather than petitioner, had submitted this report, the board did not consider the address given in the report as effecting an official change of address for petitioner (2 R. 84–85). The December 1967–January 1968 letters and induction notice were mailed by the local board to petitioner at the Glendale address (2 R. 88, 99, 101–102). None of these communications were ever returned to the board as being undeliverable (2 R. 79, 102).

v. *Collins*, 426 F. 2d 765 (C.A. 5), No. 493, this Term, certiorari denied, November 16, 1970; *Lockhart* v. *United States*, 420 F. 2d 1143, 1146 (C.A. 9); see *McKart* v. *United States*, 395 U.S. 185, 198, note 16; *Tongue* v. *United States*, 407 F. 2d 774 (C.A. 4), certiorari denied 395 U.S. 967.

In addition, a consistent line of decisions holds that local boards are without power to consider claims of improper classification tendered for the first time *after* the acts constituting the crime of wilful refusal to obey an order to report for induction have been committed. *E.g.*, *United States* v. *Stoppelman*, 406 F. 2d 127 (C.A. 1), certiorari denied, 395 U.S. 981; *Palmer* v. *United States*, 401 F. 2d 226 (C.A. 9); *United States* v. *Smogor*, 411 F. 2d 501 (C.A. 7), certiorari denied, 396 U.S. 972; *Brown* v. *United States*, 409 F. 2d 1354 (C.A. 9); *United States* v. *Powers*, 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923.[4]

Petitioner contends that he did not make a claim of conscientious objection earlier because he justifiably believed, until this Court's decision in *Welsh*, that he could not successfully assert such a claim on the basis of his non-religious scruples. However, the possibility of at least some kinds of non-religious conscientious objection was apparent after this Court's 1965 deci-

[4] Both *United States* v. *Shields*, government's petition for certiorari pending, No. 72, this Term, and *Wroblewski* v. *United States*, No. 5956, this Term, involve situations where defendants tendered conscientious objector claims for the first time at trial. In this case, the claim was first raised at a late stage in the appeal.

sion in *United States* v. *Seeger*, 380 U.S. 163, upon which petitioner had relied in part in his pretrial motion to dismiss (1 R. 44–45).*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DECEMBER 1970.

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* In *United States* v. *Shields*, supra, the defendant contended that he was justified in not making his claim of *selective* conscientious objection prior to trial because the availability of classification on that basis was not apparent until the decision in *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass.), appeal dismissed for want of jurisdiction, 399 U.S. 267. Even if the failure to make an earlier claim of selective conscientious objection is excusable because of later legal developments, the failure to make the claim of total conscientious objection, after *Seeger* v. *United States*, *supra*, had been decided, is not similarly excusable.

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In The

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October Term, 1970

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No. 1015

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JOHN RAYMOND JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# PETITIONER'S REPLY MEMORANDUM

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John Raymond Jones

2718 College Avenue
Berkeley, California
Pro Se

In The

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In its opposition memorandum, the Government does not deny that petitioner's written statements to his Local Board are prima facie evidence of conscientious objection. Nor does the Government deny the importance of the issues raised. Indeed, petitioner's primary question, differently phrased, was deemed "substantial" by the Government in its petition for writ of certiorari in United States v. Shields, No. 72, this Term (Shields Pet. 4):

> "Whether respondent, who never raised the issue of conscientious objector status before his Local Board prior to disobeying the order to submit to induction, may properly be accorded the benefit of...a later decision by this Court."

The Government instead rests its opposition on the contention that the Court of Appeals' decisions denying leave to file an additional brief and denying rehearing were correct because the issue of petitioner's conscientious objection "at that late stage could not affect the validity

of his conviction." (Op. Mem. 3). Both reasons the Government puts forth for this contention were rejected by the Seventh Circuit in Shields, supra.*

The Government attempts to distinguish Shields, supra, from the instant case by contending that while a registrant may be excused for a failure to apply for 1-O status where he is a "nonreligious" objector to a particular war, he cannot be excused where he is a "nonreligious" objector to all war. (Op. Mem. 5). The reason given for the distinction is that "at least some types of nonreligious objection were apparent after Seeger." (Op. Mem. 4). This Court held the result in Welsh v. United States, 398 U.S. 333, to be consistent with the principles set forth in United States v. Seeger, 380 U.S. 163. The Government, however, would construe this to mean that the Welsh result was merely a truism and, for practical purposes, unnecessary because Seeger had already foreclosed reasonable doubt about the scope of the term "religious". The Government would have this Court accept, as a matter of law, the view that "the failure to make the claim of total conscientious objection, after Seeger v. United States, supra, had been decided is not...excusable." (Op. Mem. 5). Petitioner submits that if his failure to apply is to be adjudged "inexcusable", the holding should come after a hearing and not, as the Government, and the Ninth Circuit, would have, as a matter of law.

In holding to its contention, rejected in Shields, supra, that a registrant's refusal to comply with an induction order makes the Board powerless to consider his conscientious objector claim (Op. Mem. 4), the Government disregards the acknowledgment in Mulloy v. United States, ___U.S.___, 3 S.S.L.R. 3301 (1970), note 5, that a

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* The reasons are (1) that a registrant cannot complain of a failure of the Local Board to give him a classification which he did not request, and (2) that Local Boards are without power to consider claims tendered after acts constituting the crime are committed. (Shields Pet. 3, 5; Op. Mem. 3, 4). The Seventh Circuit found these reasons uncompelling where registrant's failure to apply as a conscientious objector was excusable.

registrant conscientiously opposed to war who does comply with his induction order relinquishes his right to make his claim. It also disregards Ehlert v. United States, (No. 120, this Term, certiorari granted), which challenges the restrictive interpretations of CFR § 1625.2 on which the Government relies for this contention.

The Government construes note 15 in McKart v. United States, 395 U.S. 185, as a bar to the application of that decision to conscientious objector claims, (Op. Mem. 4), although the Fourth Circuit in United States v. Eades, ___F 2d___, 3 S.S.L.R. 3185, has applied McKart, supra, to a conscientious objector claimant and has construed note 15 as inapplicable where the issue involved is the effect of statutory interpretation on conscientious objection.

The Government also implies that petitioner should have done more than attack the religious requirement in § 6 (j) in a motion to dismiss; that he should have "endeavor(ed) to present...evidence that he was a conscientious objector." (Op. Mem. 2). This overlooks the fact that the written statements which are now prima facie evidence of conscientious objection were already in the trial record. The Government attempts to distinguish this case from another Ninth Circuit case, United States v. Wroblewski, No. 5955, this Term, because the latter has a ruling on the inadmissability of such evidence, whereas petitioner's record does not. The acknowledged rule in the Ninth Circuit is that a defendant-registrant is precluded from introducing evidence of conscientious objection where he did not present a claim to his Local Board. United States v. Lockhart, 420 F 2d 1143. The Government recognizes that the defense of conscientious objection was not available to petitioner at trial; and acknowledges that petitioner's beliefs are in the record. However, it would now penalize petitioner for his counsel's failure to make an admittedly futile offer of proof. The Government disregards petitioner's contention that, prior to the Welsh decision, the issue was not reasonably available to him, but that petitioner raised it when it became available.

Finally, in its effort to discount the issue that there was insufficient

evidence to prove knowing failure to report, the Government disregards the Court of Appeals' holding that the prosecution was denied the benefit of the presumption of receipt of the induction order. The Government attempts to treat the petitioner's notice of change of address to his Board as not "effecting an official change of address for petitioner". (Op. Mem. 3). However, it is clear that the Court of Appeals held that it did effect an official change and, consequently denied the Government the presumption of receipt of mail. (Pet. App. 4). Thus the Court of Appeals' error in relying on evidence never seen by the jury (Exhibit 1) to establish the sufficiency of evidence for the jury's decision (Exhibit 1A) remains unanswered by the Government.

In conclusion, the Government's failure to distinguish Shields, its disregard of Welsh, its refusal to deal with the issue of insufficiency of evidence for conviction, and its acknowledgment that the only niche available for a prima facie conscientious objector in this instance is imprisonment, further emphasize the need to grant certiorari in this case.

Respectfully submitted,

John Raymond Jones
Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 1971, two copies of Petitioner's Reply Memorandum were mailed postage prepaid to

Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

John Raymond Jones

2718 College Avenue
Berkeley, California

Pro Se